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Supreme Court, U.S.
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88-244
No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOHN D. OLITSKY,
Petitioner,

v.

SPENCER GIFTS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Section 706(b) of Title VII of the Civil Rights Act of 1964 (Title VII), which bars nonconsensual use of EEOC conciliation material in subsequent litigation, apply in a suit under the Age Discrimination in Employment Act of 1967 (ADEA) and the Employee Retirement Income Security Act of 1974 (ERISA)?

2. Does Section 706(b) of Title VII apply from the moment a charge is filed and in advance of any formal or informal finding of reasonable cause so as to bar the nonconsensual use of anything said or done in connection with the EEOC?

3. Is a prevailing plaintiff in an ADEA action entitled to an award of both pre-judgment interest and liquidated damages?

4. Is a prevailing plaintiff entitled to double front pay and pension benefits under the liquidated damages provision of the ADEA?

LIST OF ALL PARTIES TO THE PROCEEDING REQUIRED BY SUPREME COURT RULE 21.1(b)

Parties to the proceeding are as follows:

1. Spencer Gifts, Inc.
2. MCA, Inc.
3. Lawrence L. Levien, Akin, Gump, Strauss, Hauer & Feld, 1333 New Hampshire Avenue, N.W., Suite 400, Washington, D.C. 20036.
4. Max L. Lieberman, Esq., Pelino & Lentz, 2300 Packard Building, Philadelphia, Pennsylvania 19102.
5. Ralph E. Hartman, Jackson, Walker, Winstead, Cantwell & Miller, 6000 InterFirst Plaza, 901 Main Street, Dallas, Texas 75202.
6. John B. Nelson, Jackson, Walker, Winstead, Cantwell & Miller, 6000 InterFirst Plaza, 901 Main Street, Dallas, Texas 75202.
7. Bryan C. Collins, Jackson, Walker, Winstead, Cantwell & Miller, 6000 InterFirst Plaza, 901 Main Street, Dallas, Texas 75202.
8. John D. and Kathy Olitsky, 3904 Ashbury, Bedford, Texas 76021
9. Hal K. Gillespie, Esq., Hicks, Gillespie, James, Rozen & Preston, 1420 West Mockingbird Lane, Suite 760, Dallas, Texas 75247.

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SPENCER GIFTS, INC.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, John D. Olitsky (hereinafter "Olitsky"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-referenced matter on April 11, 1988 (Petition for Rehearing denied on May 11, 1988).

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals at bar is reported at 842 F.2d 123 (5th Cir. 1988). The opinion is reproduced in the Appendix hereto (App. A, at 1a).[1] The trial court's judgment and order, filed Feb-

[1] The Appendix hereto is presented in an appended volume designated "App."

ruary 12, 1987, are reproduced in the Appendix (App. D at 12a).

JURISDICTION

Olitsky's petition seeks review of the Judgment of the Court of Appeals entered on April 11, 1988. By Order dated May 11, 1988, the Fifth Circuit denied Olitsky's Petition for Rehearing (App. B at 8a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Statutes—The Appendix contains the following: The Fair Labor Standards Act, 29 U.S.C. § 216(b) (App. F, at 17a); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b), (c) and (d) (App. G, at 18a); and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), (e), and (f) (App. H, at 21a).

In addition, ERISA's discrimination provision, 29 U.S.C. § 1140 provides in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act. . . . The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Regulations—The Appendix contains all pertinent EEOC regulations: EEOC: Age Discrimination in Employment Act Procedural Regulations, 29 CFR Part 1626 (App. I, at 25a); EEOC Procedural Regulations, 29 CFR Part 1601 (App. J, at 30a).

STATEMENT OF THE CASE

A. Nature of the Case

John D. Olitsky brought suit in the United States District for the Northern District of Texas, Dallas Division, alleging his discharge resulted from age discrimination and was for the purpose of interfering with the attainment of rights to which he may have become entitled under Spencer Gifts, Inc.'s (hereinafter "Spencer Gifts") pension plan. The jurisdiction of the district court was invoked under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626, *et seq.* (the ADEA) and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.* as well as 28 U.S.C. § 1331 (general federal question jurisdiction).

B. ADEA Evidence

1. *Olitsky's History and Performance*

Spencer Gifts hired Olitsky as a buyer in March, 1973, and while Olitsky was still age 42, promoted him to the position of Merchandise Manager (Tr. 42, 47).[2] Spencer Gifts enjoyed its best profit in 1978, the year preceding Olitsky's resignation in January, 1979 to accept a Vice Presidency with another firm. During Olitsky's absence, Spencer Gifts slipped dramatically in profits (Tr. 49, 56, 244). Before his departure, Olitsky's immediate supervisor, Vice President Litvack, recommended to Spencer Gifts' President, Eugene Brog, that Olitsky be given a vice president's title, but Brog did not approve (Tr. 48-49). In July, 1981, Spencer Gifts rehired Olitsky in his former position as Merchandise Manager (Tr. 55). Concerning the rehire, Gene Brog told Henry M. Roth, the Vice President of Spencer Gifts who had been hired on December 1, 1980 at age 36 by Brog, that Olitsky had been an asset to the company (Tr. 469-70, 476).

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[2] References to the transcript will be cited "Tr." with appropriate pagination.

Olitsky performed well in 1981 and 1982. At the end of 1981, Roth thanked Olitsky for the job he had done, said he appreciated it because it had been a very hectic time for Roth, gave Olitsky a $5,000 raise, and a $6,000 bonus (Tr. 58, 486). At the end of 1982, Spencer Gifts awarded Olitsky another $5,000 pay raise and $6,000 bonus. Roth thanked Olitsky for taking on extra responsibility and for doing a job which "certainly helped the company" (Tr. 59). Roth gave Olitsky a good evaluation prepared in November or December, 1982 (Tr. 486-87). Since rejoining Spencer Gifts in July, 1981, through the end of 1982, Olitsky's salary increased from $50,000 to $65,000 per year (Tr. 60).

At the end of 1982 a new sales plan was devised and approved by Roth and Brog (Tr. 59-60, 277, 489). Olitsky's plan called for no increase in Olitsky's sales for 1983 versus 1982, since Olitsky's product classifications were changed, with downtrending categories given to Olitsky and the better classifications going to 36-year old Robert McNally, whom Roth hired as the other Merchandise Manager during the first week of January, 1983. Roth gave McNally a plan calling for upward sales due to better classifications (Tr. 61-67, 470-71). Olitsky did not complain since part of the job was to do as well as possible with downtrending categories, and performance is measured by plan, not sales in one year versus the next (Tr. 67).

In 1982, Roth and Brog began discussing a new position—a higher level than Merchandise Manager (Tr. 480). In September, 1980, Spencer Gifts had hired 23-year-old Jeri Hurvitz as an Assistant Buyer, then promoted her to Associate Buyer and then Buyer (Plaintiff's Exhibit 41, Tr. 359). Hurvitz and Roth, and then Hurvitz and McNally, began discussing her desires to move up and whether she was content just being a buyer (Tr. 359-60). The next step up was Merchandise Manager, Olitsky's job. While Roth discussed career aspira-

tions with then 27-year-old Hurvitz and 36-year-old McNally, throughout McNally's first year, Roth never talked to Olitsky about his long-terms goals with Spencer Gifts (Tr. 239, 480, 511). In discussing the higher position, the one McNally received the day Olitsky was fired, Roth and Brog never discussed Olitsky as a candidate (Tr. 264-65, 480).

2. *The Warning*

With 1983 almost over, and Olitsky meeting Plan while McNally was well below Plan (Tr. 108-110, Plaintiff's Exhibits 10A and 10B), Roth met with Olitsky a few minutes and gave him a memo dated October 27, 1983 complaining of failure to increase sales sufficiently versus 1982 sales (Tr. 483). Roth immediately left for the orient (Tr. 485-87). Roth's October 27, 1983 Memo was the first actual criticism to Olitsky—Olitsky had always dealt with Roth on a businesslike, professional basis, and prior to October 27, on a continuing basis, Roth met with all his Merchandising Managers to discuss areas where buyers can be improved (Tr. 485). Olitsky immediately replied to the October 27 Memo by noting that performance is measured by Plan—the agreement he and Roth and Brog had entered at the start of 1983 (Tr. 160-61, Plaintiff's Exhibit 14). Roth agreed with Olitsky's reply (Tr. 489). Olitsky and Roth testified that last year's figures cannot be compared to this years since the categories and buyers have changed (Tr. 242-43, 475-76). Olitsky testified from 27 years in the retail business that evaluation of a Merchandise Manager and buyer is based upon Plan (Tr. 42-44, 47). Both Roth and Brog, who had approved Olitsky's Plan for 1983, testified that in approving this Plan, they were not sealing Olitsky's fate on grounds that he would be performing poorly by meeting Plan (Tr. 334, 548).

At the same time Olitsky made Plan, Hurvitz and McNally were well below; Roth testified that meeting

Plan is a minimum job requirement, an agreed amount of sales for classifications over a period of time and the goal for buyers and Merchandise Managers (Tr. 509-10, 540-41). Brog agreed that meeting Plan is a minimum job requirement (R. 333-34). Roth described serious problems if Plan is not met, and McNally, the other Merchandise Manager (37 years old) who was promoted when Olitsky was fired, counseled buyers to meet Plan and about being below Plan (Tr. 375, 508-12). For the fall of 1983, Olitsky delivered $900,000 more in gross margin dollars (the net dollars used to pay expenses of the company) than did McNally (Tr. 543; Plaintiff's Exhibit 10D).

3. *The Firing*

Despite the fact that Olitsky followed up the October 27 conversation by sending a series of job performance and special project memos to buyers, memos approved by Roth (R. 47-89), on December 13, 1983, Roth called Olitsky into his office and fired him. Roth told Olitsky he (Olitsky) was trying to turn things around, but that Roth was reorganizing the department and had no room for Olitsky in the reorganization (Tr. 87-88). As of November 22, 1983, a secret "merchant reorganization" had occurred in which Olitsky was eliminated (Plaintiff's Exhibit 19).

On the evening of Olitsky's termination, President Brog, who was involved in the termination decision, told Olitsky's wife, Kathy, that there was nothing wrong with Olitsky's performance, his business was all right, but it was just one of those things (Tr. 450-51). Brog told her John Olitsky was probably the most decent, honest, and hard-working individual in the company's employ. *Id.* Within eight days after Olitsky's termination, Vice President Roth wrote a glowing recommendation of Olitsky which, at trial, Roth described as accurate (Tr. 504-05).

4. *Spencer Gifts Reasons Stated to the EEOC*

While Roth mentioned reorganization at the time of his discharge, Spencer Gifts submitted its reason for firing Olitsky by letter of its Vice President and General Counsel, Ronald Mangel, to the EEOC, dated April 11, 1984, citing poor peformance, relying on sales statistics. Spencer Gifts supplied a copy of Mangel's letter and relied upon it in answering plaintiff's interrogatories (Plaintiff's Exhibit 38). That same Mangel letter is included as a part of the EEOC file introduced into evidence as Plaintiff's Exhibit 36.

5. *Ronald Mangel's Oral Statement to the EEOC Agent*

After his letter to the EEOC of April 11, 1984 (part of the EEOC file) Plaintiff's Exhibit 36, and Spencer Gifts's Answers to Interrogatories (Plaintiff's Exhibit 38), the notes of EEOC investigator Janice Johnson dated May 7, 1984 quote Mangel as stating to her that he "can't rebut if McNally was promoted." McNally was a younger employee who was promoted when Olitsky was fired.

6. *An Additional Stated Reason for Termination*

Over a year after the discharge, during depositions, Brog asserted he had lost confidence in Olitsky due to two incidents in late 1983 (Tr. 303-05, 322). Olitsky put on evidence that in both instances he had performed well, beyond criticism. Olitsky had received no criticism on these matters before or at termination (Tr. 576-80).

7. *Other ADEA Evidence*

The Spencer Gifts Policy Manual contains a "warning procedure" stating:

> Warning notices are given when violations of company rules or work performance occur. Continued violations or poor job performance will result in disciplinary action.

(Plaintiff's Exhibit 30). The October 27, 1983 letter was the first written notice to Olitsky that could be called a warning notice, and there were no subsequent notices or disciplinary action (Tr. 538). The treatment of Olitsky contrasted to that of a much younger employee, buyer Dennis Seelbach, who was given a "first warning" at the end of 1983, but who was retained and given a bonus at year end of 1983 (Plaintiff's Exhibit 19B, Tr. 85).

Roth, who recommended termination of Olitsky to Brog, introduced Olitsky and the other older person in Roth's division, Carmon Bonanni, as old-timers at meetings. Roth surrounded himself with young people whom he promoted (Tr. 92). Roth never considered Olitsky for promotion to the position above Merchandise Manager that went to McNally. Also, in deciding which buyer to promote to the Merchandise Manager position (to replace Olitsky), the top buyer, Charles Goff, age 43, was never discussed. The only person discussed was Jeri Hurvitz, whose performance versus Plan was far below Goff's (Tr. 500-502). Hurvitz, then 27 years old, was promoted to Olitsky's job at a salary of $40,000, compared to Olitsky's $65,000 per year salary (Tr. 362). Further, while Bonanni was a long term employee in his early 60's, a young new-hire, Larry Campbell, was given a position more fitted to long term growth and with broader authority than the position retained by Bonanni (Tr. 294-95, 499-500). Brog offered no business reason for these facts (Tr. 294-95).

Within Roth's division Spencer Gifts had a pattern of hiring young Vice Presidents and terminating them at a young age (Plaintiff's Exhibits 6-9). In the history of the division, Goldman was hired at 43, terminated at 46; Giamette was hired at age 39, terminated at 42; Litvack was hired at age 35, terminated at age 40; Roth was hired at age 36, terminated at age 40; and Brog terminated McNally (who had been hired at age 36) at about McNally's 40th birthday (Tr. 323-22).

C. ERISA Evidence

In addition to the evidence of pretext, while Spencer Gifts rehired Olitsky at age 50, it would not hire him as Vice President. Spencer Gifts rehired Olitsky as Merchandise Manager, kept him for three years, and terminated him only a few months before he met the ten-year vesting period of his pension rights. Spencer Gifts replaced Olitsky with Jeri Hurvitz, an employee with only three years vesting credit (Plaintiff's Exhibit 41, Response No. 6). Spencer Gifts showed no older employee who survived to receive a pension. An acknowledged performer, Zimmerman, hired at age 58, retired at 65 and missed the ten-year vesting requirement by three years (Tr. 306-07).

Spencer Gifts' President, Eugene Brog, stated he had no intention to fire Olitsky to deprive him of pension benefits and that he had mistakenly believed that Olitsky would not vest until eight years after his discharge because of his break in service. Brog testified that in the conversation before rehiring Olitsky in 1981, he told Olitsky he understood Olitsky had lost his past benefits and there was nothing he (Brog) could do about it because of the way the Plan read (Tr. 326-27). However, Olitsky testified that when Brog rehired him in 1981, Brog did not say this; Olitsky testified that the only items discussed in the interview were the level of salary, paying Olitsky's hotel expenses during the transition, a moving allowance, and trips for his wife to house hunt (Tr. 575). McNally, whom Spencer Gifts hired in January, 1983, testified he learned of the vesting rules as to pension benefits from Roth and Brog; Roth testified that when he was hired in 1980, he discussed the qualifications and requirements of the pension plan with Brog.

The Spencer Gifts plan is set up so the company saves money when it severs an employee prior to vesting. Forfeitures of benefits arising because of severance of employment before an employee has reached the minimum

vesting standard are applied to reduce the amount of contributions Spencer Gifts makes to the pension plan and not to increase the benefits payable to participants in the plan. Further, the plan provides that if and when the trust is terminated, sums left in the fund after it has satisfied all its liabilities are returned to Spencer Gifts (Plaintiff's Exhibit 69, p. 7, ¶ 3.01, and p. 20, ¶ 9.03). The net value of the assets of the pension plan for the year ended December 31, 1983 were $10,647,318. Compared to this, Spencer Gifts, Inc. paid pension benefits to only 47 people in the total amount of $41,000 for the year 1983 (Plaintiff's Exhibit 38, Responses 4 and 5).

D. Ruling of the District Court

Prior to the jury trial on the ADEA claim and the trial to the court on the ERISA claim, Spencer Gifts filed a Motion for Summary Judgment and a Motion to Dismiss for Want of Jurisdiction (R. 47).[3] On November 4, 1985, United States District Judge Robert W. Porter issued a Memorandum Order and Opinion denying Spencer Gifts's motions (R. 440, App. C, at 9a).

The case proceeded to jury trial on Olitsky's ADEA claim and a trial before the court on the ERISA claim before visiting United States District Judge William C. Keady. The jury returned a verdict for Olitsky, awarding back pay of $221,021 and liquidated damages of $221,021 on the back pay award. The district court additionally awarded $216,824 for lost pension benefits, $363,244 in front pay, and $90,000 in attorney's fees (R. 689-95). Judgment totaled $1,112,110, with post-judgment interest, and was entered on February 9, 1987 (Tr. 698).

In addition, the district court found Spencer Gifts discharged Olitsky for the purpose of interfering with the

[3] References to the pleadings record are designated "R." with appropriate pagination.

attainment of rights to which Olitsky may have become entitled under Spencer Gifts' employee benefit plan, in violation of 29 U.S.C. § 1140. Judge Keady found that Olitsky's losses, in the form of lost pension benefits as a result of termination totaled $216,824, though Olitsky could not recover this amount twice (R. 695). The district court denied Olitsky's request to double the front pay award and for an award of pre-judgment interest on the back pay award (Tr. 693-94).

E. Ruling of the Fifth Circuit Court of Appeals

The Fifth Circuit reversed the district court and remanded for a new trial on a single evidence point. The Fifth Circuit ruled that the admission of the EEOC file containing the hand-written notes of EEOC agent Janice Johnson who quoted Ronald Mangel, Spencer Gifts' in-house counsel, as stating he "can't rebut if McNally was promoted" violated § 706(b) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(b). *Olitsky v. Spencer Gifts*, 842 F.2d 123, 126 (5th Cir. 1988).

The Fifth Circuit noted Olitsky's challenges to the district court's failure to include prejudgment interest in the award and its refusal to award liquidated damages as a result of the front pay award. The Fifth Circuit noted the other Spencer Gifts challenges to the district court's decision—that the evidence was insufficient to support fact-findings, that the court erred concerning jury instructions on liquidated damages and Olitsky's mitigation obligation, and that Olitsky's lost pension benefits were improperly calculated. The Fifth Circuit stated: "Because we hold that the admission of the EEOC file was reversible error, we express no opinion on these other issues."

REASONS FOR GRANTING THE WRIT

This Court recently clarified a nagging question about the administration of Title VII claims, deferral and the 300-day limit for filing charges, with its decision in *EEOC v. Commercial Office Products Co.*, 486 U.S. ——, 100 L.Ed. 2d 96 (1988). Now the Fifth Circuit's holding in *Olitsky* that § 706(b) of Title VII applies to ADEA actions, and indeed to ERISA actions, creates a crisis for practitioners and a dilemma for the courts under the ADEA, ERISA's discrimination provisions, and Title VII itself. The Fifth Circuit's decision engrafts into the ADEA a Title VII provision that does not fit the ADEA's streamlined statutory scheme, while mistaking and confusing the nature of conciliation and § 706(b) under Title VII itself. The decision eliminates the evidentiary value of all information obtained by the EEOC in its investigation process, not simply information it receives after a finding of reasonable cause and the initiation of informal methods of conference, conciliation, and persuasion—the area protected by Section 706(b) of Title VII. Until this Court rules, a major source of evidence —all information that was provided to the EEOC—cannot be safely introduced. This defeats the investigative function of the EEOC, grossly and unnecessarily complicates trial proceedings, and greatly undermines the discrimination proof mechanism approved by this Court.

In addition, this petition would permit this Court to resolve a conflict between the circuits as to the availability of prejudgment interest in an ADEA action in which liquidated damages are awarded. Finally, this petition asks the Court to clarify the effect of the ADEA's provision for liquidated damages as to "amounts owing" and the Court's decision in *Transworld Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), by deciding whether liquidated damages are available for all amounts owing, or only for lost back pay and benefits.

I. THE FIFTH CIRCUIT'S HOLDING THAT § 706(b) OF TITLE VII APPLIES TO ADEA/ERISA ACTIONS CLOUDS ALL SUCH ACTIONS AND REQUIRES PROMPT CLARIFICATION

Section 706(b) is a provision of Title VII, not the ADEA. The Fifth Circuit held that the admission of the EEOC file into evidence in an ADEA/ERISA action violated § 706(b). *Olitsky v. Spencer Gifts*, 842 F.2d 123, 126 (5th Cir. 1988) (App. A, at 4a). The Fifth Circuit acknowledged "doubt as to whether § 706(b) of Title VII has any application in an ADEA case." *Id.* at 5a. Inexplicably, the Fifth Circuit stated it did "not address that issue because neither party has raised it." *Id.* In fact, as shown by the court's first footnote, the express holding of the case, to such an extent that it did not even reach other major issues raised by the parties, was that the admission of the EEOC file violated § 706(b) of Title VII, grounds for reversal in an ADEA/ERISA case. *Id.* at 4a, n.1. Thus, the Fifth Circuit not only reached the issue, but the holding of the case is that § 706(b) of Title VII applies in an ADEA/ERISA case. Inexplicably, the Fifth Circuit reversed not only the ADEA judgment, about which at least it expressed doubt concerning the application of a Title VII provision, but also the trial court's ERISA judgment in favor of Olitsky. The Olitsky brief indeed attacked Spencer Gifts' reliance upon § 706(b) by pointing out to the court that by its own terms, it is applicable to Title VII claims, not ADEA claims.[4]

Because of the Fifth Circuit's ruling, unless this Court grants certiorari to consider the question, all ADEA and ERISA cases brought in the Fifth Circuit, and all such cases brought in all other circuits in that the *Olitsky*

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[4] Counsel for Olitsky also, in an exchange between the court and counsel in oral argument, stated to the Fifth Circuit that the evidence was properly admitted because Section § 706(b) does not apply in an ADEA case.

decision is the only holding on this point, are clouded. The ADEA requires plaintiffs to first file a charge with the ADEA and to wait at least 60 days before filing suit after filing the charge; the EEOC's procedures permit the Commission to conduct investigations of ADEA charges. 29 CFR § 1626.4 (App. I, at 25a). Under the Fifth Circuit's *Olitsky* decision, all in the EEOC's investigative files is sealed—not just admissions, but the more usual items of an EEOC file—the statistics provided by the employer to the EEOC, the answers to questions, and the stated reasons for the adverse action. This is so because § 706(b) protects everything "said or done." 42 U.S.C. § 2000e-5(b), § 706(b) (App. H, 22a). Likewise, the defendant may not introduce the parts of an EEOC file in which the plaintiff states his "facts" or allegations, long before any formal or informal finding of reasonable cause.

In sharp contrast to § 706(b) of Title VII, the ADEA provides streamlined procedures, allowing an eye discrimination claimant to file suit within sixty days of filing an EEOC charge regardless of whether the Commission consents, investigates, or attempts conciliation. ADEA, § 7(d), 29 U.S.C. § 626(d) (App. G, at 18a-20a). Unlike Title VII, the ADEA does not itself call for the Commission to investigate, let alone make a finding of reasonable cause; unlike Title VII, the ADEA does not set forth protective language as to statements made in the course of conciliation. The ADEA simply provides:

> Upon receiving a charge, the Commission shall promptly notify all parties named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

ADEA, § 7(d), 29 U.S.C. § 626(d) (App. G, at 19a-20a). Although the EEOC's ADEA procedural regula-

tions permit the Commission to conduct investigations of alleged violations of the ADEA, including charges, and to issue a written notice to respondents of a violation and intent to begin *or continue* conciliation, for purposes, among other things, of tolling limitations under § 7(e)(2) of the ADEA for up to one year (*compare* 29 C.F.R. § 1626.1, 29 C.F.R. § 1626.15(b), and 29 U.S.C. § 626 (e)(2)), this is in sharp contrast to the express Title VII provisions and detailed EEOC procedural regulations calling for a finding of cause or no cause. 42 U.S.C. § 2000e-5(b); 29 C.F.R. §§ 1601.15, 1601.19, 1601.21. (App. J, at 32a-36a). Of great significance, the EEOC procedural regulations for Title VII, 29 C.F.R. Part 1601, even provide for negotiated settlement in advance to a finding of reasonable cause in addition to the conciliation procedure and authority procedure that is triggered by a finding of reasonable cause. *Compare* 29 C.F.R. § 1601.20 *with* 29 C.F.R. § 1601.24, App. J, at 35a, 38a.

Now, under *Olitsky*, despite separate statutes and markedly separate procedural regulations employed by the EEOC in ADEA cases versus Title VII cases, parties may not safely proceed to litigation and utilize any information contained in an EEOC file. This is true because of the Fifth Circuit's language and reasoning. The Fifth Circuit claims that while Title VII requires the EEOC to make a finding of reasonable cause before beginning the period of conciliation, the ADEA does not. *Olitsky*, *supra*, App. A, at 5a, n.2.[5] The Fifth Circuit rejects the notion that at formal finding of reasonable cause is necessary in an ADEA action in order to trigger the confidentiality provisions of § 706(b) of Title VII.

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[5] The Fifth Circuit opinion fails to take into account the EEOC's procedural regulations under Title VII wherein conciliation, although not the kind of conciliation that triggers § 706(b)'s confidentiality clause, is encouraged even prior to a finding of reasonable cause. See 29 C.F.R. § 1601.20 (App. J, at 35a-36a).

According to Fifth Circuit, it did not matter where the Mangel statement occurred in the EEOC process—whether it was before or after a finding, formal or informal, of reasonable cause to believe the law was violated. According to the Fifth Circuit:

> If we were to allow the use of such admissions in later litigation, we would attach a penalty to the candor and forthrightness that Congress obviously believed were necessary to the successful conciliation of disputes. We decline to take that step.

Id. at 6a.

Thus, the Fifth Circuit has ignored the fact that even under Title VII, the statute in which § 706(b) is found, conciliation efforts can and do occur *before* a finding of reasonable cause, while § 706(b) comes into play only *after* a finding of reasonable cause. Under the *Olitsky* decision, the confidentiality provision of § 706(b) of Title VII comes into play regardless of formal or, for that matter, informal findings of reasonable cause in the investigation process by the EEOC in all ADEA actions. Accordingly, practitioners and courts are faced with a choice between the Fifth Circuit's pronouncement and the language of Congress and the implementing regulations propounded by the EEOC. Until this matter is clarified, practitioners may not, regardless of the clear language of the statutes and enforcing regulations, safely utilize any information in the EEOC file.

II. THE FIFTH CIRCUIT'S INTERPRETATION OF § 706(b) MISSTATES THE CONCILIATION PROCESS UNDER TITLE VII, CLOUDS ALL TITLE VII ACTIONS AND REQUIRES PROMPT CLARIFICATION

The logical and straightforward approach to Spencer Gifts' argument that the district court's ADEA/ERISA judgment should be reversed because of the introduction of the EEOC file containing Mangel's comment about not

being able to rebut was to simply note that the district court tried an ADEA and ERISA action, not a Title VII action, and that § 706(b) could not possibly be a basis for declaring evidence in such actions inadmissible.[6] Not only does the ADEA not contain an equivalent of § 706(b), but the EEOC has separate procedural regulations for Title VII versus ADEA actions, and under the latter, there simply is no § 706(b) counterpart. *Compare* 29 C.F.R. §§ 1601.24 and 1601.26 (Title VII regulations), App. J., *with* 29 C.F.R. § 1626.12 (ADEA regulations), App. I.

Instead, the Fifth Circuit rationalized application of § 706(b) of Title VII to an ADEA case. In so doing, however, the Fifth Circuit badly misstated the conciliation process under Title VII itself. Specifically, the *Olitsky* court rejected Olitsky's argument that § 706(b) could not possibly apply in an ADEA action, since, on its face, § 706(b) provides that the confidentiality requirements in connection with its conciliation language is triggered by a finding of reasonable cause, while the ADEA contains no such language. The Fifth Circuit dubbed this argument "mechanistic," and said in a footnote:

> Title VII *requires* the EEOC to make a finding of reasonable cause before beginning the period of conciliation. 42 U.S.C. § 2000e-5(b). The ADEA, by contrast, provides only that after receiving a charge of age discrimination, the EEOC "shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion," 29 U.S.C. § 626(d). (emphasis added).

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[6] Alternatively, the Fifth Circuit could have avoided the question and ruled the admission of Mangel's comment harmless. Instead, the Fifth Circuit omitted discussion of the bulk of Olitsky's evidence and erroneously stated that Olitsky's counsel had "repeatedly" stressed Mangel's statement in jury argument. *Compare Olitsky, supra*, App. A, at 7a *with* Tr. 649-50.

Olitsky, supra, App. A, at 5a, n.2. Next, the Fifth Circuit expounded about the obvious purpose of the statute's prohibitions on revealing statements made during conciliation efforts. This discussion highlights the Fifth Circuit's failure to understand that § 706(b), laudatory as it is concerning the confidentiality of *certain* conciliation efforts, is, nonetheless, by its own term, a provision of limited scope—it applies to only some conciliation efforts —those that are commenced *after* a finding of reasonable cause. The Fifth Circuit is wrong in stating that "Title VII requires the EEOC to make a finding of reasonable cause before beginning the period of conciliation." Instead of this, § 706(b) simply provides that those concilation agreements that begin after a finding of reasonable cause are insulated from nonconsensual admission into evidence.

It is painfully obvious that Title VII nowhere prohibits the EEOC from beginning conciliation before finding reasonable cause. Indeed, the EEOC's procedural regulations concerning "PROCEDURE FOLLOWING FILING A CHARGE" contain detailed provisions for negotiated settlement efforts in advance of a finding of cause or no cause. 29 C.F.R. § 1601.20 (App. J, at 35a-36a). In other words, the Commission under Title VII may engage in much the same process utilized under the ADEA—from the very outset. It may encourage the parties to resolve their differences. This in no way changes the fact that under § 706(b)'s plain language and the EEOC's Title VII procedural regulations themselves, investigation and conciliation efforts proceed simultaneously, and § 706(b) with its confidentiality provision does not come into play until an actual finding of reasonable cause is made by the Commission.

The effect of the language of § 706(b) of Title VII and the EEOC's procedural regulations is to insulate only a small percentage of the information provided to the EEOC from nonconsensual trial use. Of all the

charges filed with the EEOC, only a small percentage are resolved by a finding of reasonable cause—others go to court with no finding, one way or the other, as permitted by the statute and the EEOC regulations, or indeed, they go to court despite a finding of no cause by the Commission. For 1975, for example, the EEOC received 66,097 new charges, completed 23,286 investigations, made 8,589 findings of cause, and 11,937 findings of no cause. Equal Employment Opportunity Commission, 10th Annual Report, a Decade of Equal Employment Opportunity, 1965-1975, p. 54. Thus, in 1975, findings of cause constituted only 13% of the new charges with the EEOC. In the last annual report submitted by the EEOC, 18th Annual Report, Equal Employment Opportunity Commission, April 1984, the EEOC does not provide precise numbers as to the findings of cause. Of 66,461 charges filed under Title VII, the ADEA and the Equal Pay Act, there were 30,500 findings of no cause or no violation. When the charges for which no findings are made are coupled with those in which the Commission finds no cause, it is plain that § 706(b), by its language, comes into play in only a small percentage of cases. Even in these cases, the rest of the EEOC file would be outside the scope of § 706(b).

However, under the Fifth Circuit's rationale, anything that is said to the EEOC from the moment the charge is filed may be deemed a part of the conciliation process. The Fifth Circuit states:

> If we were to allow the use of [statements made by a company representative to an investigator] in later litigation, we would attach a penalty to the candor and forthrightness that Congress obviously believed were necessary to the successful conciliation of disputes. We decline ot take that step.

Olitsky, supra, at 6a. Despite the Fifth Circuit's concern for candor, Congress also provided for EEOC investigations, hopefully to obtain truthful information, and provided that from the very outset the EEOC should try to

encourage settlement. Congress chose to provide no § 706(b) type language in the ADEA; the EEOC chose not to use § 706(b) type language in its ADEA procedural regulations; and Congress chose to protect *only* statements made in the conciliation talks that were conducted *after* a finding of reasonable cause.

III. THE FIFTH CIRCUIT'S INTERPRETATION OF § 706(b) OF TITLE VII UNDERMINES THE RULINGS OF THIS COURT AS TO PROOF OF DISCRIMINATION

The rules governing proof in discrimination cases have been established in a series of landmark Supreme Court decisions.[7] Though this Court has never addressed the point, the circuits held that the rulings concerning proof of discrimination under Title VII are applicable in ADEA actions. *See, e.g., Thornbrough v. Columbia and Greenville Railroad Co.*, 760 F.2d 633, 638-39, n.4 (5th Cir. 1985) (citing authority of First, Third, Ninth, and Tenth Circuits). After the plaintiff has established a prima facie case, and the employer has articulated a non-discriminatory business reason for the adverse action, the burden is upon the plaintiff to, directly or indirectly, show the proffered explanation is unworthy of credence—a pretext. *Burdine, supra*, 450 U.S. at 256. It is of critical importance that plaintiffs who seek to show the stated reason is pretextual need not rely upon direct evidence. At this court has stated: "There will seldom be 'eye witness' testimony as to the employer's mental processes." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 at 716 (1983).

Thus, a discrimination plaintiff may prevail by discrediting the employer's stated reason. Obviously, where

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[7] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983).

the stated reason changes one or more times, as can be shown by the statements of the employer to the EEOC as contrasted with its statements in discovery, at trial, at the time of firing, the plaintiff presents key evidence to discredit the stated reason. Additionally, where an employer gives a reason to the EEOC that either the EEOC investigation or the plaintiff's discovery later shows would not likely have been the real reason—i.e. performance where, in fact, the plaintiff had better performance than those who were kept—the plaintiff must be in a position to put into evidence the original reason articulated by the employer—the one generally that is given to the EEOC, and not the one refined by the defendant as a result of the investigation and discovery process.

Olitsky must be reversed to prevent § 706(b) from having the warped effect of insulating employers from proof that the reason they state at trial is a pretext it differs from the one originally articulated that does not hold water. It would be great irony and bad law, undermining this Court's efforts to give effect to Congress' anti-discrimination laws, to provide a workable proof scheme but to seal the evidence. Citing *Aikens*, *supra*, 460 U.S. 711, the Third Circuit holds, "A defendant which is less than honest in proffering its reason for discharge risks an unnecessary age discrimination verdict. . . ." *Chipollini v. Spencer Gifts, Inc.*, 814, 893, 899 (3d Cir. 1987). Now, as long as the evidence comes from the EEOC file, the usual repository of evidence as to the facts and stated reasons, the employer can give no reason when he fires the employee, tell the EEOC anything, and pick what turns out to be the most jury-plausible excuse for litigation.

This Court's proof mechanism acknowledges the possibility that an employer may state a non-discriminatory reason untruthfully, without candor, and that an alleged victim is entitled to put on evidence to show the truth.

By restricting the confidentiality provision in § 706(b) to discussions *after* a finding of reasonable cause, Congress also must have anticipated that parties might make candid admissions *before* the § 706(b) stage is reached that could be used in court without permission. While § 706(b) is laudatory and should promote candor within the conciliation conferences that take place after a finding of reasonable cause (when the EEOC can pressure for a settlement based upon its determination), to strip a plaintiff (or a defendant) in a discrimination matter of the ability to introduce information and admissions against interest that occur during the EEOC's investigation process is contrary to the purpose of the Act—to eliminate discrimination.

The Fifth Circuit has previously stated:

> Because it is relatively easy for a plaintiff to establish a prima facie case and for a defendant to articulate legitimate, non-discriminatory reasons for his decision, most disparate treatment cases are resolved at the third stage of the inquiry, on the issue of whether the defendant's reasons are pretextual.

Thornbrough, supra, 760 F.2d at 639. Where Congress has established and funded a major agency, the EEOC, to investigate allegations of employment discrimination, the peculiar effect of the *Olitsky* interpretation of § 706(b) would be to make proof of what actually happened far more difficult, despite the proof mechanism, since the information contained in the EEOC files would be inadmissible. In sharp contrast, the courts, until *Olitsky*, have permitted use of information in EEOC files (gathered, presumably, in advance of and not as part of the § 706(b)-post reasonable cause finding process) in disparate treatment cases. *See, e.g., Geromette v. General Motors Corp.*, 609 F.2d 1200 (6th Cir. 1979); *Marks v. Prattco, Inc.*, 607 F.2d 1153 (5th Cir. 1979).

IV. THIS COURT SHOULD RESOLVE THE DISPUTE BETWEEN THE CIRCUITS AS TO THE AVAILABILITY OF BOTH PREJUDGMENT INTEREST AND LIQUIDATED DAMAGES IN AN ADEA ACTION

There is a split between the circuits as to the availability of pre-judgment interest along with liquidated damages in an ADEA case. Holding that in light of *Transworld Airlines v. Thurston*, 469 U.S. 111 (1985), Congress intended liquidated damages to be punitive in nature, the Eleventh and Second Circuits hold that liquidated damages and pre-judgment interest can be awarded simultaneously. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094 (11th Cir. 1987); *Bonura v. Chase Manhattan Bank*, 629 F.2d 353 (S.D. N.Y. 1986), *aff'd at* 795 F.2d 276 (2d Cir. 1986). *See also Criswell v. Western Airlines*, 709 F.2d 544, 556-57 (9th Cir. 1983), *aff'd*, 472 U.S. 400 (1985).

In contrast, post-*Thurston*, the Seventh Circuit holds plaintiffs are not entitled to an award of both liquidated damages and prejudgment interest. *Coston v. Plitt Theaters*, 831 F.2d 1321, 44 FEP 1722 (7th Cir. 1987), *cert. denied*, —— U.S. ——, 46 F.E.P. Cases 888. Other circuits, with pre-*Thurston* decisions, stand with the Seventh Circuit. *Blim v. Western Electric Co.*, 731 F.2d 1473, 1479-80 (10th Cir.), *cert. denied*, 469 U.S. 874 (1984); *Rose v. National Cash Register Corporation*, 703 F.2d 225, 230 (6th Cir.), *cert. denied*, 464 U.S. 939 (1983); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1101-03 (8th Cir. 1982); *Kolb v. Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981).

Although the Fifth Circuit declined to reach this point in *Olitsky*, App. A, at 4a, this is purely a legal question, ripe for clarification by this Court.

V. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE PLAIN WORDING OF THE ADEA, THE COURT'S RULING IN *THURSTON*, AND THE CIRCUIT COURTS THAT HAVE RULED THAT THE PREVAILING PLAINTIFF IS NOT ENTITLED TO DOUBLE FRONT PAY AND PENSION BENEFITS UNDER THE LIQUIDATED DAMAGES PROVISION OF THE ADEA

Clearly an ADEA plaintiff who establishes a willful violation is entitled to liquidated (double) damages as to all pecuniary losses, including wages, fringes, and other job-related benefits. *See, e.g., Blim v. Western Electric Co., Inc.*, 731 F.2d 1473, 1480 (10th Cir.), *cert. denied*, 469 U.S. 874 (1984); *Merkle v. Scovill*, 570 F.Supp. 141 (S.D. Ohio 1983) (doubling applies to amounts employer would contribute to reinstated employees' pension plan).

An open and major question under the ADEA, particularly in light of this Court's ruling in *Transworld Airlines v. Thurston*, 469 U.S. 111 (1985), that liquidated damages are punitive in nature, is whether, when the ADEA refers to doubling "amounts owing," 29 U.S.C. § 626(b), and a jury concludes that the amount owing for example, in the *Olitsky* case, is $363,244 front pay and $216,824 for lost pension benefits, such amounts are subject to doubling. Without any satisfactory explanations, but with reasoning that hints at judicial discomfort with awarding large amounts of punitive damages, the circuits that have reached the issue have held that "amounts owing" does not refer to proven losses of front pay and benefits. *Blum v. Witco Chemical Corp.*, 829 F.2d 367 (3d Cir. 1987); *Cassino v. Rischold Chemicals, Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987). The Tenth Circuit provides an unclear signal, holding that liquidated damages should double losses of employees' savings plan benefits and social security benefits that will not be restored by repromotion. *Blim, supra*, 731 F.2d at 1480. The Fifth Circuit expressly declines to reach this issue.

Olitsky, supra, 46 FEP Cases at 903, n. 1 (App. A, at 4a). Since this is a pure question of law, and it involves perhaps the most substantial aspect of damages in age discrimination cases,[8] this Court should decide whether "amounts owing" include all amounts.

CONCLUSION

Accordingly, a writ of certiorari should issue to review the judgment.

Respectfully submitted,

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[8] Congress recognizes the plight of older workers seeking new employment. *See* ADEA, 29 U.S.C. § 621, "Congressional Statement of Findings and Purpose," that states in part:

(a) The Congress hereby finds and declares that—

(1) In the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

* * * *

(3) The incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability, is relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave.

APPENDICES

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS
FIFTH CIRCUIT
(NEW ORLEANS)

No. 87-1231

OLITSKY

v.

SPENCER GIFTS, INC.

April 11, 1988

Appeal from the U.S. District Court for the
Northern District of Texas

Hal K. Gillespie (Hicks, Gillespie, James & Lesser), Dallas, Texas, for appellee and cross-appellant.

Max L. Lieberman (Pelino & Lentz), Philadelphia, Pa., and Lawrence D. Levien and Paul M. Eskildsen, Washington, D.C., for appellant and cross-appellee.

Before THORNBERRY, Senior Circuit Judge, and GEE and POLITZ, Circuit Judges.

Full Text of Opinion

HOMER THORNBERRY, Senior Circuit Judge:—In December 1983, Spencer Gifts, Inc. fired John D. Olitsky from his position as merchandise manager. Olitsky was

53 years old. After unsuccessful efforts at conciliation by the Equal Employment Opportunity Commission, Olitsky brought this discrimination case in federal district court, alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. After a jury trial, the court entered judgment on both claims for Olitsky. Spencer Gifts appeals the award of damages to Olitsky, but Olitsky also appeals, contending that the court should have awarded pre-judgment interest and additional liquidated damages. We reverse and remand for a new trial and thus do not reach Olitsky's claims.

I.

In 1973, Spencer Gifts originally hired Olitsky, at the age of 42, as a buyer for its retail store division. In 1979, Olitsky resigned to take a position with another firm. But in 1981 Spencer Gifts again hired Olitsky, at the age of 50, as merchandise manager. Olitsky occupied this position until December 1983, when he was fired. Olitsky first filed a charge of age discrimination with the EEOC. The EEOC's efforts to conciliate the dispute proved unsuccessful, and Olitsky brought this action in district court. He charged that Spencer Gifts fired him because of his age, in violation of the ADEA. He also charged that Spencer Gifts fired him for the purpose of defeating his pension rights, in violation of ERISA. At the time of his discharge, Olitsky was only a few months from meeting the ten-year vesting period of his pension rights.

The evidence at trial showed that Olitsky performed well in 1981 and 1982. During those years, he received bonuses, raises, and favorable evaluations. Spencer Gifts introduced evidence attempting to show, however, that Olitsky's 1983 performance was less competent. Testi-

mony indicated, for example that Olitsky's 1983 sales figures were only slightly higher than his 1982 figures, while the chain as a whole—and in particular two other merchandise buyers who moved up when Olitsky was fired—showed much greater increases. Furthermore, Spencer Gift's president testified that he found inadequate Olitsky's performance at a regional sales meeting.

In response to Spencer Gift's claims, Olitsky testified that his sales figures, while showing little improvement from the previous year, nevertheless met, or nearly met, his annual sales plan. He claimed that Spencer Gifts viewed meeting the plan as more important than year-to-year comparisons because buyers were assigned different categories of merchandise from one year to the next. In 1983, for example, he testified that Spencer Gifts had assigned him the "downtrending" categories—those that were not expected to show sales increase. Olitsky believed that he had done well to sell as much from those categories as he did. Thus, Olitsky sought to prove that Spencer Gifts' articulated reason for firing him—poor performance—was a pretext.

An important and possibly determinative item of evidence was the EEOC's file on this dispute. During the EEOC's investigation and conciliation efforts, EEOC agent Janice Johnson had interviewed Ronald Mangel, Spencer Gift's in-house counsel. Although the district court prevented Johnson from testifying, it allowed the introduction of her file into evidence. Johnson's file contained handwritten notes that reported Mangel as saying he "can't rebut if McNally was promoted." McNally was a younger employee who was promoted when Olisky was fired. Olisky's counsel forcefully argued to the jury that this statement was an admission that Spencer Gifts could not rebut the allegation of age discrimination if, as was true, McNally had been promoted.

II.

Spencer Gifts argues on appeal that the district court erred in admitting the EEOC file into evidence.[1] It asserts that the file is specifically inadmissible under section 706(b) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(b); that the file contains statements made in the course of compromise and settlement discussions and thus is inadmissible under Fed.R.Evid. 408; and that the file is hearsay not within any exception. We agree that the admission of the file violated section 706(b).

Section 706(b) provides in part that the EEOC shall investigate charges of unlawful employment practices.

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, concilation, and persuasion. *Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the writen consent of the persons concerned.*

42 U.S.C. § 2000e-5(b) (emphasis added). Olitsky first argues that section 706(b) applies only to prelitigation

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[1] Spencer Gifts also raises several other challenges to the district court's decision. It argues that the evidence was insufficient to support the fact findings, that the court erred in instructing the jury on liquidated damages and on Olitsky's obligation to mitigate damages, and that Olitsky's lost pension benefits were improperly calculated. Olitsky in turn challenges the district court's failure to include prejudgment interest in the award, and its refusal to award liquidated damages as a result of the front pay award. Because we hold that the admission of the EEOC file was reversible error, we express no opinion on these other issues.

disclosures to the public, not to subsequent litigation between the parties to the dispute. Olitsky is correct that the section does not prevent disclosure by the EEOC of material to the parties to the agency proceeding. *EEOC v. Association Dry Goods Corp.*, 449 U.S. 590, 598, 101 S.Ct. 817, 822, 66 L.Ed.2d 762, 24 FEP Cases 1356 (1981). The issue in this case, however, is not governed by the part of the section that prohibits disclosure to the public; it is governed by the part of the section that prohibits any use of the material in "subsequent proceedings." We interpreted this latter part in *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 880-81, 25 FEP Cases 653 (5th Cir. Unit A 1981). In *Branch* we denied the plaintiff's request to discover EEOC conciliation material for use in a Title VII action against the employer, in part because section 706(b) prohibits the use of such material in later litigation. We therefore reject Olitsky's argument in the present case. Section 706(b) clearly prohibits any use of EEOC concilation material in subsequent litigation, even by the parties to the agency proceeding.

We acknowledge that there may exist some doubt as to whether section 706(b) of Title VII has any application to an ADEA case. We do not address that issue because neither party has raised it. Spencer, of course, argues that section 706(b) directly governs the dispute. Olitsky argues only that the prerequisite of the confidentiality provision of the section were not met; he does not argue that the section has no applicability to ADEA cases.

Olitsky also argues that the confidentiality provision does not apply to this case because the EEOC's role in age discrimination cases does not include a formal finding of reasonable cause.[2] He points out that, under section

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[2] Title VII requires the EEOC to make a finding of reasonable cause before beginning the period of conciliation. 42 U.S.C. § 2000e-5(b). The ADEA, by contrast, provides only that, after receiving a charge of age discrimination, the EEOC "shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d).

706(b), such a finding seems to be necessary before the beginning of the "conference, conciliation, and persuasion" stage. Because no formal finding was ever made in the agency's action on his claim, Olitsky argues that, when Johnson recorded the Mangel statements, the EEOC was engaged not in concilation but in investigation. As a result, the confidentiality provision should be inapplicable.

We reject Olitsky's mechanistic interpretation of the statute. Discussing the purposes of the confidentiality provision of the section, we have held:

> The obvious purpose of the statute's prohibition on revealing statements made or actions taken during the Commission's conciliation efforts is to promote the congressional policy favoring unlitigated resolution of employment discrimination claims. Cooperation and voluntary compliance are the preferred means for the elimination of unlawful employment discrimination, and Congress . . . established an informal dispute resolution procedure to accomplish this goal.

Branch v. Phillips Petroleum Co., 638 F.2d 873, 880, 25 FEP Cases 653 (5th Cir. Unit A 1981). Mangel's supposed admission of liability to the EEOC investigator in this case is exactly the kind of exchange among the parties and the EEOC that informal conciliation ought to encourage. Admissions of partial liability tend to narrow the issue in the settlement discussions and therefore facilitate a resolution without litigation. If we were to allow the use of such admissions in later litigation, we would attach a penalty to the candor and forthrightness that Congress obviously believed were necessary to the successful conciliation disputes. We decline to take that step.

Olitsky next argues that Spencer Gifts waived its right to complain about the admission of the EEOC file. Olitsky does not assert that Spencer Gifts failed to object to the admission of the file. It is difficult to understand the argument that Olitsky does make, but he apparently con-

tends that because Spencer Gifts successfully prevented the live testimony of Johnson concerning the file, it somehow elected to forego any challenge to the admission of the file. Olitsky, however, cites no authority for this proposition and our review of the record does not persuade us that Spencer Gifts abandoned its objections to the file.

Finally, Olitsky argues that the introduction of the EEOC file, if error, was harmless. In *Figgs v. Quick Fill Corp.*, 766 F.2d 901, 38 FEP Cases 865 (5th Cir. 1985) (per curiam), we applied harmless error analysis to a claim that testimony was erroneously admitted in violation of section 706(b). In that Title VII case, the district court allowed the employer to introduce evidence that it had made an offer of reinstatement to the employee during concilation by EEOC. The evidence was relevant to whether the employee had made reasonable efforts to mitigate damages. We held, however, that any error in the district court's evidentiary ruling was harmless because there was additional evidence, "totally outside the realm of EEOC concilation efforts, [that was] sufficient to support the district court's finding that Quick Fill made an unconditional offer of reinstatement to Figgs." *Id.* at 903.

We think the present case is different from *Figgs*. The statements by Mangel in the EEOC conciliation file may easily be interpreted as a virtual concession of liability by Spencer Gifts. Indeed, that is exactly what Olitsky's counsel repeatedly suggested to the jury in closing argument. We are not persuaded that the erroneous introduction of this highly damaging statement had no effect on the jury's verdict. The other competent evidence of Spencer Gifts' liability is not sufficiently strong to allow such a conclusion. Thus, we cannot conclude that the error was harmless.

III.

The judgment of the district court is REVERSED and the cause is REMANDED for a new trial.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1231

JOHN D. OLITSKY,
Plaintiff-Appellee
Cross-Appellant,

versus

SPENCER GIFTS, INC.,
Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(May 11, 1988)

Before THORNBERRY, GEE and POLITZ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs, Jr.
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-84-1117-F

JOHN D. OLITSKY

vs.

SPENCER GIFTS, INC.

[Filed Nov. 4, 1985]

MEMORANDUM ORDER AND OPINION

Pending before the Court are Defendant's motion for summary judgment and motion to dismiss. Having considered the numerous arguments of the parties, pleadings, affidavits, exhibits, and discovery material on file in this case, the Court is of the opinion that summary judgment is inappropriate, and Defendant's motion must therefore be denied. Defendant's motion to dismiss is also denied.

Plaintiff alleges two basic grounds for relief, an age discrimination claim under the Age Discrimination and Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, and an ERISA claim under 29 U.S.C. § 1001 *et seq.* Defendant has moved for summary judgment as to each. Additionally, Defendant has moved to dismiss the ERISA for failure to exhaust administrative remedies.

To make out a *prima facie* case of age discrimination in a discharge case, four elements must be shown: "that he [the plaintiff] was within the statutorily protected age group, that he was discharged, that the employer sought

to replace him with a younger person and that he was replaced with a younger person outside the protected group." *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 590 (5th Cir. 1978). In this case, Defendant concedes that Plaintiff was discharged and was within the statutorily protected age group at the time of discharge. Defendant argues, however, that there is insufficient evidence on the record to show that Defendant sought to replace Plaintiff with a younger person or that he actually was replaced with a younger person. Viewing the evidence and all factual inferences in favor of the non-movant, as this Court must do in considering a summary judgment motion, it cannot be determined as a matter of law that Plaintiff was not the victim of a discriminatory motive. The Court cannot substitute its factual findings for a jury's by granting summary judgment where there exists real issues of material fact. The moving part "bears the burden of establishing the absence of any disputed material fact," *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223, 228 (5th Cir. 1984), and the Defendant here fails to carry that burden.

Defendant attacks Plaintiff's ERISA claim on two grounds. First, Defendant contends that the ERISA claim should be dismissed because Plaintiff had not exhausted administrative remedies available to him under the terms of the pension plan in question, and thus this Court does not have jurisdiction over the ERISA claims. Defendant cites *Kross v. Western Electric, Inc.*, 701 F.2d 1238 (7th Cir. 1983), as authority that the exhaustion doctrine is supported by "strong policy" in favor of allowing trustees "primary responsibility for claim processing to avoid turning 'every claimed dispute into a federal case,'" and the imposition of litigation expenses on benefit funds. 701 F.2d at 1244 (citing *Challenger v. Local Union No. 1, International Bridge Structural & Ornamental Iron Workers*, 619 F.2d 645, 649 (7th Cir. 1980). Defendant is disingenuous, however, in asserting that this "strong policy" deprives the Court of subject matter

jurisdiction over Plaintiff's ERISA claim. Section 502 (a) (3) of ERISA authorizes civil suits for violations of the provisions of ERISA itself. This section is "*silent* as to whether exhaustion of administrative remedies is a prerequisite to bringing such a civil action. Rather, application of the exhaustion doctrine in ERISA cases by requiring a claimant to exhaust administrative remedies prior to bringing suit is a matter *within the discretion of the trial court.*" 701 F.2d at 1244. In a situation such as this where extensive discovery has been conducted, and pretrial preparation begun in anticipation of trial in the near future, this Court would be guilty of wasting both the Court's and the parties' time and resources if the exhaustion doctrine were construed to foreclose Plaintiff's original ERISA claim.

As to whether Defendant has carried its burden of demonstrating that no issue of material fact exists to preclude entry of summary judgment on the ERISA claim, the same standards as discussed above apply. Application of these standards compels the same result—it is not clear that, as a matter of law, Plaintiff has failed to produce evidence which would allow a jury to conclude that an ERISA violation occurred.

So ORDERED this 4 day of November, 1985.

/s/ Robert W. Porter
ROBERT W. PORTER
United States District Judge

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[1] Defendant expresses some confusion whether Plaintiff's complaint asserts a claim to enforce pension plan rights under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), or to recover equitable relief for ERISA violations under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Because Plaintiff's claim is that Defendant's conduct wrongfully prevented Plaintiff from reaching vested status under the pension plan and thus kept Plaintiff from obtaining plan rights, it is unreasonable to read his complaint as one to enforce rights under the plan. Common sense dictates that Plaintiff's complaint be read as one for equitable relief which asserts ERISA violations under § 502(a)(3).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-84-1117-F

JOHN D. OLITSKY,
Plaintiff

vs.

SPENCER GIFTS, INC.,
Defendant

[Filed February 12, 1987]

JUDGMENT

This action came on for trial before the Court and the jury, Honorable William C. Keady presiding, on February 4, 1987. This case was submitted to the jury on certain issues on February 9, 1987, and the jury returned its findings which the Court received.

The issues submitted to the jury and the answers returned by them are as follows:

Question No. 1

Do you find by a preponderance of the evidence that Plaintiff, at the time of his dismissal, was qualified to perform the job of Merchandise Manager at Spencer Gifts, Inc.

Answer: Yes.

Question No. 2

Do you find by a preponderance of the evidence that the Plaintiff's age was the determining factor that caused Defendant to discharge Plaintiff?

Answer: Yes.

Question No. 3

Do you find by a preponderance of the evidence that Defendant's conduct was willful?

Answer: Yes.

Question No. 4

Do you find by a preponderance of the evidence that after his termination from Spencer Gifts, Inc., Plaintiff failed to make a reasonable effort to find or to retain comparable employment or was discharged for cause?

Answer: No.

Question No. 5

From the time of his discharge with Spencer Gifts until now, what sum of money, if any, in addition to what he has already made, do you find that Plaintiff could have earned had he made a reasonable effort to find or to retain other employment or had he not been discharged for cause?

Answer: Not applicable.

Question No. 6

What amount of damages, if any, do you find would compensate Plaintiff for his losses suffered from date of termination to date of trial?

Answer: $221,021.00.

Question No. 7

Do you find from a preponderance of the evidence that it would be feasible or workable to reinstate the Plaintiff in his former position with the Defendant?

Answer: No.

Question No. 8

If you did not find that it would be feasible or workable to reinstate Plaintiff in his former position with Defendant, then what damages, if any, do you find from a preponderance of the evidence would constitute reasonable future pay from the time of this trial until Plaintiff would retire or takes other comparable employment after deducting earnings he will reasonably make during this period?

Answer: $363,244.00.

Certain issues were considered by the Court as follows:

As to Question No. 7, listed above, the Court submitted this issue to the jury for an advisory opinion and instructed that the jury's opinion did not bind the Court on this issue. The Court accepted the jury's advisory opinion and found from a preponderance of the evidence that it would not be feasible or workable to reinstate the Plaintiff in his former position with the Defendant.

Likewise, as to Question No. 8, this question was submitted to the jury strictly for an advisory opinion, with instructions that the Court would not be bound by the jury's decision. The Court has accepted the jury's decision as to front pay.

In addition, the Court found the Defendant discharged Plaintiff for the purpose of interfering with the attainment of rights to which Plaintiff may have become entitled under Defendant's employee benefit plan, in violation of 29 U.S.C. § 1140, and that Plaintiff's losses, in

the form of lost pension benefits, as a result of such termination total $216,824.00. The Court found, in the alternative, that the lost pension benefits in the amount of $216,824.00 is damages resulting from the termination of Plaintiff by Defendant in violation of the ADEA, as found by the jury, and that, accordingly, Plaintiff is entitled to the amount of $216,824.00 on this element of his case, under the ADEA claim and the ERISA claim, though he will not recover this amount twice.

In addition, the Court finds that reasonable attorney's fees in this case totaled $90,000.00, calculated at the rate of $150.00 per hour, and based upon a reasonable amount of 600 hours, accumulated by Plaintiff's attorney.

In addition, the Court, having accepted the jury finding of willfulness as to Question 3, doubled the back pay damages found by the jury in response to Question No. 6, thereby adding to the total of the judgment an additional $221,021.00.

IT IS ORDERED AND ADJUDGED that Plaintiff, John D. Olitsky, recover of the Defendant, Spencer Gifts, Inc., the sum of $1,112,110.00, with interest thereon from the date of judgment at the rate of 5.75% per annum, and his costs of action.

Dated at Dallas, Texas, this 12th day of February 1987.

/s/ William C. Keady
WILLIAM C. KEADY
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-84-1117-F

JOHN D. OLITSKY

v.

SPENCER GIFTS, INC.

ORDER

Before the Court comes Defendant's motion for judgment notwithstanding the verdict, motion for new trial, and motion to alter judgment.

Defendant's motion for judgment notwithstanding the verdict is denied. The facts and inferences do not point so strongly and overwhelmingly in favor of the Defendant that the Court believes that reasonable men could not arrive at a contrary verdict. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

Defendant's motion for new trial is also denied. The Court does not view the verdict as being against the greater weight of the evidence. *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 (5th Cir. 1980).

The Court is also not persuaded by Defendant's arguments to alter the judgment. Defendant cites no recent Fifth Circuit authority for its propositions.

So ORDERED this 5th day of March, 1987.

/s/ William C. Keady
WILLIAM C. KEADY
United States District Judge

APPENDIX F

29 U.S.C. FAIR LABOR STANDARDS ACT

§ 216. Penalties

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215 (a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

APPENDIX G

29 U.S.C. § 626. [ADEA, § 7]

Age discrimination in Employment Act of 1967
Recordkeeping, investigation, and enforcement

* * * *

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual actions upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

* * * *

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier. Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged

unlawful practice by informal methods of conciliation, conference, and persuasion.

* * * *

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling

* * * *

(2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

APPENDIX H

TITLE VII of the CIVIL RIGHTS ACT OF 1964

42 U.S.C. § 2000e-5. [Title VII, § 706] Enforcement provisions

* * * *

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission, contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elmination of unlawful practices; prohbition on disclosure of informal endeavors to end unlawful practice; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall made an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to

believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten

days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charges; jurisdiction and venue of the United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may

bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

APPENDIX I

EEOC: Age Discrimination in Employment Act Procedural Regulations—29 CFR Part 1626

** * * The regulations were effective January 3, 1983 (48 FR 138) and last amended effective April 1, 1984 (49 FR 13023).*

PART 1626—PROCEDURES—AGE DISCRIMINATION IN EMPLOYMENT ACT

* * * *

§ 1626.1 Purpose.

The regulations set forth in this Part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of the Age Discrimination in Employment Act of 1967, as amended.

§ 1626.2 Terms defined in the Age Discrimination in Employment Act of 1967, as amended.

* * * *

§ 1626.3 Other definitions.

For purpose of this Part, the term "the Act" shall mean the Age Discrimination in Employment Act of 1967, as amended. . . .

§ 1626.4 Information concerning alleged violations of the Act.

The Commission may, on its own initiative, conduct investigations of employers, employment agencies and labor organizations, in accordance with the powers vested in it pursuant to sections 6 and 7 of the Act. The Commission shall also receive information concerning alleged violations of the Act, including charges and complaints, from any source. Where the information discloses a pos-

sible violation, the appropriate Commission office may render assistance in the filing of a charge. The identity of complainant, confidential witness, or aggrieved person on whose behalf a charge was filed will ordinarily not be disclosed without prior written consent, unless necessary in a court proceeding.

• • • •

§ 1626.7 Timeliness of charge.

(a) Charges will not be rejected as untimely provided that they are not barred by the statute of limitations as stated in section 6 of the Portal to Portal Act of 1947.

(b) Potential charging parties will be advised that, pursuant to section 7(d)(1) and (2) of the Act, no civil suit may be commenced by an individual until 60 days after a charge has been filed on the subject matter of the suit, and such charge shall be filed with the Commission or its designated agent within 180 days of the alleged discriminatory action, or, in a case where the alleged discriminatory action occurs in a state which has its own age discrimination law and authority administering that law, within 300 days of the alleged discriminatory action, or 30 days after receipt of notice of termination of State proceedings, whichever is earlier.

• • • •

§ 1626.11 Notice of charge.

Upon receipt of a charge, the Commission shall promptly notify the respondent that a charge has been filed.

§ 1626.12 Conciliation efforts pursuant to section 7(d) of the Act.

Upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion. Such notification enables the charging party or any person aggrieved by the subject matter of the

charge to commence action to enforce their rights without waiting for the lapse of 60 days.

§ 1626.13 Withdrawal of charge.

Charging parties may request withdrawal of a charge. Because the Commission has independent investigative authority, see 1626.4 above, it may continue any investigation and may secure relief for all affected persons notwithstanding a request by a charging party to withdraw a charge.

§ 1626.14 Right to inspect or copy data.

A person who submits data or evidence to the Commission may retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that a witness may for good cause be limited to inspection of the official transcript of his or her testimony.

§ 1626.15 Commission enforcement.

(a) As provided in Sections 9, 11, 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209, 211, 216 and 217) (FLSA) and Sections 6 and 7 of this Act, the Commission and its authorized representatives may (1) investigate and gather data; (2) enter and inspect establishments and records and make transcripts thereof; (3) interview employees; (4) impose on persons subject to the Act appropriate recordkeeping and reporting requirements; (5) advise employers, employment agencies and labor organizations with regard to their obligations under the Act and any changes necessary to their policies, practices and procedures to assure compliance with the Act; (6) subpoena witnesses and require the production of documents and other evidence; and (7) supervise the payment of amounts owing pursuant to section 16(c) of the FLSA, and (8) institute action under section 16(c) or section 17 of the FLSA or both to obtain appropriate relief.

(b) Whenever the Commission has a reasonable basis to conclude that a violation of the Act has occurred or will occur, it may commence conciliation under section 7(b) of the Act. The date of issuance of written notice to the respondent of the Commission's intent to begin or continue conciliation shall determine when the statute of limitations is tolled pursuant to section 7(e)(2) of the Act. Such notice will ordinarily be issued in the form of a letter of violation; provided, however, that failure to issue a written violation letter shall in no instance be construed as a finding of no violation. The Commission will ordinarily notify the respondent and aggrieved persons of its determination. In the process of conducting any investigation or conciliation under this Act, the identity of persons who have provided information in confidence shall not be disclosed except in accordance with § 1626.4. When the written notice prescribed above is issued, the statute of limitations shall be tolled for a period of one year unless a conciliation agreement is obtained earlier.

(c) Any agreement reached as a result of efforts undertaken pursuant to this section shall, as far as practicable, require the respondent to eliminate the unlawful practice(s) and provide appropriate affirmative relief. Such agreement shall be reduced to writing and will ordinarily be signed by the Commission's delegated representative, the respondent, and the charging party, if any. A copy of the signed agreement shall be sent to all the signatories thereto.

(d) Upon the failure of informal conciliation, conference and persuasion under section 7(b) of the Act, the Commission may initiate and conduct litigation.

(e) The District Directors, and the Director of the Office of Program Operations or their designees, are hereby delegated authority to exercise the powers enumerated in 1626.15(a)(1) through (7) and (b) and (c).

The General Counsel or his/her designee is hereby delegated the authority to exercise the powers in paragraph (a) of this section and at the direction of the Commission to initiate and conduct litigation.

* * * *

§ 1626.19 Rules to be liberally construed.

(a) These rules and regulations shall be liberally construed to effectuate the purposes and provisions of this Act and any other acts administered by the Commission.

(b) Whenever the Commission receives a charge or obtains information relating to possible violations of one of the statutes which it administers and the charge or information reveals possible violations of one or more of the other statutes which it administers, the Commission will treat such charges or information in accordance with all such relevant statutes.

(c) Whenever a charge is filed under one statute and it is subsequently believed that the alleged discrimination constitutes an unlawful employment practice under another statute administered and enforced by the Commission, the charge may be so amended and timeliness determined from the date of filing of the original charge.

APPENDIX J

EEOC: Procedural Regulations—29 CFR Part 1601

These procedural regulations were issued July 1, 1965, and last amended effective February 5, 1988 (53 FR No. 24) . . . .

PART 1601—PROCEDURAL REGULATIONS

* * * *

§ 1601.1 Purpose.

The regulations set forth in this part 1601 contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of Title VII of the Civil Rights Act of 1964, as amended. Based upon its experience in the administration of the Act and upon its evaluation of suggestions and petitions for amendments submitted by interested persons in accordance with § 1601.35, the Commission may from time to time amend and revise these procedures.

Subpart A—Definitions

* * * *

§ 1601.3 Other definitions.

For the purposes of this Part, the term "Title VII" or "the Act" shall mean Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972. . . .

* * * *

Subpart B—Procedure for the Prevention of Unlawful Employment Practices

§ 1601.6 Submission of information.

(a) The Commission shall receive information concerning alleged violations of Title VII from any person. Where the information discloses that a person is entitled

to file a charge with the Commission, the appropriate office shall render assistance in the filing of a charge. Any person or organization may request the issuance of a Commissioner charge for an inquiry into individual or systematic discrimination. Such request, with any pertinent information, should be submitted to the nearest District Office.

(b) A person who submits data or evidence to the Commission may retain or, on payment of lawfully prescribed costs, procure a copy of transcript thereof, except that a witness may for good cause be limited to inspection of the official transcript of his or her testimony.

* * * *

§ 1601.13 Filing; deferrals to State and local agencies.

* * * *

(d) *Preliminary relief.* When a charge is filed with the Commission, the Commission may make a preliminary investigation and commence judicial action for immediate, temporary or preliminary relief pursuant to section 706(f)(2) of Title VII.

* * * *

§ 1601.14 Service of charge or notice of charge.

(a) Within ten days after the filing of a charge in the appropriate Commission office, the Commission shall serve respondent a copy of the charge, by mail or in person, except when it is determined that providing a copy of the charge would impede the law enforcement functions of the Commission. Where a copy of the charge is not provided, the respondent will be served with a notice of the charge within ten days after the filing of the charge. The notice shall include the date, place and circumstances of the alleged unlawful employment practice. Where appropriate, the notice may include the identity of the person or organization filing the charge.

* * * *

INVESTIGATION OF A CHARGE

§ 1601.15 Investigative authority.

(a) The investigation of a charge shall be made by the Commission, its investigators, or any other representative designated by the Commission. During the course of such investigation, the Commission may utilize the services of State and local agencies which are charged with the administration of fair employment practice laws or appropriate Federal agencies, and may utilize the information gathered by such authorities or agencies. As part of each investigation, the Commission will accept any statement of position or evidence with respect to the allegations of the charge which the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, or the respondent wishes to submit.

(b) As part of the Commission's investigation, the commission may require the person claiming to be aggrieved to provide a statement which includes:

(1) a statement of each specific harm that the person has suffered and the date on which each harm occurred;

(2) for each harm, a statement specifying the act, policy or practice which is alleged to be unlawful;

(3) for each act, policy, or practice alleged to have harmed the person claiming to be aggrieved, a statement of the facts which lead the person claiming to be aggrieved to believe that the act, policy or practice is discriminatory.

(c) The Commission may require a fact-finding conference with the parties prior to a determination on a charge of discrimination. The conference is primarily an investigative forum intended to define the issues, to determine which elements are undisputed, to resolve those issues that can be resolved and to ascertain whether there is a basis for negotiated settlement of the charge.

(d) The commission's authority to investigate a charge is not limited to the procedure outlined in paragraphs (a), (b) and (c) of this section.

* * * *

PROCEDURE FOLLOWING FILING OF A CHARGE

§ 1601.18 Dismissal: Procedure and authority.

(a) Where a charge on its face, or as amplified by the statements of the person claiming to be aggrieved discloses, or where after investigation the Commission determines, that the charge and every portion thereof is not timely filed, or otherwise fails to state a claim under Title VII, the Commission shall dismiss the charge. A charge which raises a claim exclusively under section 717 of Title VII shall not be taken and persons seeking to raise such claims shall be referred to the appropriate federal agency.

(b) Where the person claiming to be aggrieved fails to provide requested necessary information, fails or refuses to appear or to be available for interviews or conferences as necessary, fails or refuses to provide information requested by the Commission pursuant to § 1601.15(b), or otherwise refuses to cooperate to the extent that the Commission is unable to resolve the charge, and after due notice, the charging party has had thirty days in which to respond, the Commission may dismiss the charge.

* * * *

§ 1601.19 No cause determinations: Procedure and authority.

(a) Where the field office completes its investigation of a charge and finds that there is not reasonable cause to believe that an unlawful employment practice has occurred or is occurring as to all issues addressed in the determination or as to some but not all issues addressed in the determination, the issuing director shall issue a

letter of determination to all parties to the charge indicating the finding. The issuing director's letter of determination shall not be final when issued. The letter of determination shall inform the person claiming to be aggrieved or the person on whose behalf a charge was filed of the right to request a review of the determination by the Commission. The person claiming to be aggrieved or the person on whose behalf a charge was filed may request a review of the issuing director's determination within 14 days of the date of the issuing director's determination by the Director, Determinations Review Program, Office of Program Operations, Equal Employment Opportunity Commission, 2401 E Street N.W., Washington, D.C. 20507. The issuing director's letter of determination shall inform the person claiming to be aggrieved or the person on whose behalf a charge was filed of the right to sue in federal district court within 90 days of the date that the issuing director's letter of determination becomes the Commission's final determination.

(1) If the person claiming to be aggrieved or the person on whose behalf a charge was filed does not timely request a review of the issuing director's letter of determination, the letter of determination shall become the final determination of the Commission on the 15th day from the date of the issuing director's letter of determination. If the person claiming to be aggrieved or the person on whose behalf a charge was filed submits a timely request for review of the issuing director's letter of determination, the Commission shall process the request for review and issue a final determination. If, on review, a finding of reasonable cause is made, then the Commission shall issue a reasonable cause determination and procees the charge in accordance with this part.

* * * *

(b) In those instances in which the Commission has not delegated the authority to issue no reasonable cause determinations to field offices, and the Commission or the

Program Director or designee, Office of Program Operations, finds that no reasonable cause exists to believe an unlawful employment practice has occurred or is occurring as to all issues addressed in the determination, the Commission shall issue a decision or a letter of determination or the Program Director, Office of Program Operations, shall issue a letter of determination to all parties to the charge indicating the finding.

(1) A letter of determination or decision issued under this subsection shall be final when issued, and shall inform the person claiming to be aggrieved, the person on whose behalf a charge was filed or those persons specified in § 1601.28(b)(3)(ii) of the right to sue in federal district court within 90 days of the date the person claiming to be aggrieved or the person on whose behalf a charge was filed receives the letter of determination.

* * * *

(c) In those instances in which a charge was processed by a 706 agency under contract with the Commission and the Commission finds that no reasonable cause exists to believe an unlawful employment practice occurred or is occurring as to all issues addressed in the determination, the Commission shall issue letter of determination to all parties to the charge indicating the finding.

(1) A letter of determination issued under this subsection shall be final when issued, and shall inform the person claiming to be aggrieved or the person on whose behalf a charge was filed of the right to sue in federal district court within 90 days of the date the person claiming to be aggrieved or the person on whose behalf a charge was filed receives the letter of determination.

* * * *

§ 1601.20 Negotiated settlements.

(a) Prior to the issuance of a determination as to reasonable cause, the Commission may encourage the parties

to settle the charge on terms that are mutually agreeable. District Directors, Area Directors, Local Directors, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Regional Programs, Office of Program Operations, or their designees, shall have the authority to sign any settlement agreement which is agreeable to both parties. When the Commission agrees in any negotiated settlement not to process that charge further, the Commission's agreement shall be in consideration for the promises made by the other parties to the agreement.

(b) In the alternative, the Commission may facilitate a settlement between the person claiming to be aggrieved and the respondent by permitting withdrawal of the charge pursuant to § 1601.10 [As last amended by 40 FR 13873]

§ 1601.21 Reasonable cause determination: Procedure and authority.

(a) After completing its investigation, where the Commission has not settled or dismissed a charge or made a no cause finding as to every allegation addressed in the determination under § 1601.19, the Commission shall issue a determination that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring under Title VII. A determination finding reasonable cause is based on, and limited to, evidence obtained by the Commission and does not reflect any judgment on the merits of allegations not addressed in the determination.

(b) The Commission shall provide prompt notification of its determination under paragraph (a) of this section to the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, and the respondent, or in the case of a Commission charge, the person named in the charge or identified by the Commis-

sioner in the third-party certificate, if any, and the respondent.

* * * *

§ 1601.22 *Confidentiality.*

Neither a charge, nor information obtained pursuant to section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709(c) and (d) of Title VII, shall be made matters of public information by the Commission prior to the institution of any proceedings under this Title involving such charge or information. This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State and local authorities as may be appropriate or necessary to the carrying out of the Commission's function under Title VII, nor to the publication of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information.

PROCEDURE TO RECTIFY UNLAWFUL EMPLOYMENT PRACTICES

§ 1601.23 Preliminary or temporary relief.

(a) In the interest of the expeditious procedure required by section 706(f)(2) of Title VII, the Commission hereby delegates to the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Regional Programs, Office of Program Operations and each District Director the authority, upon the basis of a preliminary investigation, to make the initial determination on its behalf that prompt judicial action is necessary to carry out the purposes of the Act and recommend such action to the General Counsel. The Com-

mission authorizes the General Counsel to institute an appropriate action on behalf of the Commission in such a case not involving a government, governmental agency, or political subdivision.

* * * *

§ 1601.24 Conciliation: Procedure and authority.

(a) Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring and after the review provided for in § 1601.19, the commission shall endeavor to eliminate such practice by informal methods of conference, conciliation, and persuasion. In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief. Where such conciliation attempts are successful, the terms of the conciliation agreement shall be reduced to writing and shall be signed by the Commission's designated representative and the parties. A copy of the signed agreement shall be sent to the respondent and the person claiming to be aggrieved. Where a charge has been filed on behalf of a person claiming to be aggrieved, the conciliation agreement may be signed by the person filing the charge or by the person on whose behalf the charge was filed.

(b) District Directors, the Program Director, Office of Program Operations; or the Directors, Regional Programs, Office of Program Operations, or their designees, are hereby delegated authority to enter into informal conciliation efforts. District Directors or upon delegation, Area Directors or Local Directors; the Program Director, Office of Program Operations; the Director of Systemic Programs, Office of Program Operations; or the Directors, Regional Programs, Office of Program Operations are hereby delegated the authority to negotiate and

sign conciliation agreements. When a suit brought by the Commission is in litigation, the General Counsel is hereby delegated the authority to negotiate and sign conciliation agreements where, pursuant to section 706 (f) (1) of Title VII, a court has stayed proceedings in the case pending further efforts of the Commission to obtain voluntary compliance.

(c) Proof of compliance with Title VII in accordance with the terms of the agreeemnt shall be obtained by the Commission before the case is closed. In those instancea in which a person claiming to be aggrieved or a member of the class claimed to be aggrieved by the practice alleged in the charge is not a party to such an agreement, the agreement shall not extinguish or in any way prejudice the rights of such person to proceed in court under section 706 (f) (1) of Title VII. [As last amended by 52 FR 28983]

§ 1601.25 Failure of conciliation; notice.

Where the Commission is unable to obtain voluntary compliance as provided by Title VII and it determines that further efforts to do so would be futile or nonproductive, it shall, through the appropriate District Director, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Regional Programs, Office of Program Operations, or their designees, so notify the respondent in writing. [As last amended by 48 FR 19165, effective April 28, 1983]

§ 1601.26 Confidentiality of endeavors.

(a) Nothing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence, in a subsequent

proceeding without the written consent of the persons concerned. This provision does not apply to such disclosures to the representatives of Federal, State or local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under Title VII; *Provided, however,* That the Commission may refuse to make disclosures to any such agency which does not maintain the confidentiality of such endeavors in accord with this section or in any circumstances where the disclosures will not serve the purposes of the effective enforcement of Title VII.

(b) Factual information obtained by the Commission during such informal endeavors, if such information is otherwise obtainable by the Commission under section 709 of Title VII, for disclosure purposes will be considered by the Commission as obtained during the investigatory process.

PROCEDURE CONCERNING THE INSTITUTION OF CIVIL ACTIONS

§ 1601.28 Civil actions by the Commission.

The Commission may bring a civil action against any respondent named in a charge not a government, governmental agency or political subdivision, after thirty (30) days from the date of the filing of a charge with the Commission unless a conciliation agreement acceptable to the Commission has been secured: *Provided, however,* That the Commission may seek preliminary or temporary relief pursuant to section 706(f)(2) of Title VII, according to the procedures set forth in § 1601.23 hereof, at any time.

§ 1601.28 Notice of right to sue: Procedure and authority.

(a) Issuance of notice of right to sue upon request: (1) When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued and the

charge to which the request relates is filed against a respondent other than a government, governmental agency or political subdivision, the Commission shall promptly issue such notice as described in § 1601.28(e) to all parties, at any time after the expiration of one hundred eighty (180) days from the date of filing of the charge with the Commission, or in the case of a Commissioner charge 180 days after the filing of the charge or 180 days after the expiration of any period of reference under section 706(d) of Title VII as appropriate.

(2) When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued, and the charge to which the request relates is filed against a respondent other than a government, governmental agency or political subdivision, the Commission may issue such notice as described in § 1601.28(e) with copies to all parties, at any time prior to the expiration of 180 days from the date of filing the charge with the Commission: *Provided*, That the District Director, the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Regional Programs, Office of Program Operations has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect.

* * * *

(b) Issuance of notice of right to sue following Commission disposition of a charge.

(1) Where the Commission has found reasonable cause to believe that the Act has been violated, has been unable to obtain voluntary compliance with Title VII, and where the Commission has decided not to bring a civil action against the respondent, it will issue a notice of right to sue on the charge as described in § 1601.28(e) to:

(i) The person claiming to be aggrieved, or,

(ii) In the case of a Commissioner charge, to any member of the Class who is named in the charge, identified by the Commissioner in a third-party certificate, or otherwise identified by the Commission as a member of the class, and provide a copy thereof to all parties.

(2) Where the Commission has entered into a conciliation agreement to which the person claiming to be aggrieved is not a party, the Commission shall issue a notice of right to sue on the charge to the person claiming to be aggrieved.

(3) Where the Commission has dismissed a charge pursuant to § 1601.18, it shall issue a notice of right to sue as described in § 1601.28(e) to:

(i) The person claiming to be aggreived, or,

(ii) In the case of a Commissioner charge, to any member of the class who is named in the charge, identified by the Commissioner in a third-party certificate, or otherwise identified by the Commission as a member of the class, and provide a copy thereof to all parties.

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Subpart E—Construction of Rules

§ 1601.34 Rules to be liberally construed.

These rules and regulations shall be liberally construed to effectuate the purpose and provisions of Title VII. [As last amended, effective February 20, 1979]